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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1142

DONALD F. UNDERHILL,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

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vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

Petitioner, Donald F. Underhill, prays that a writ of certiorari issue to review a judgment against him of the Supreme Court of Illinois.

REPORT OF OPINION BELOW.

The opinion of the Supreme Court of Illinois, of which review by this Court is sought, is officially reported in Volume 230, Northeastern Reporter, Second Series, West Publishing Company, St. Paul, Minnesota, at page 837 (230 N.E. 2d 837). The opinion as reported is included in the Appendix hereto at page 1a thereof.

JURISDICTION OF THIS COURT.

The judgment sought to be reviewed was entered on September 29, 1967.

Defendant's petition for rehearing was denied on November 27, 1967.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, Section 1257, United States Code Annotated. The pertinent provisions of the said Statute are as follows:

> Final judgments * * * rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is especially set up or claimed under the Constitution, * * * of, * * * the United States.

THE QUESTIONS PRESENTED FOR REVIEW.

1. Whether the federal sanction of the *McNabb-Mallory* rule of exclusion of confessions obtained during unlawful detention of persons suspected of crime should, through the Fourteenth Amendment, be made applicable to State criminal prosecutions so as to safeguard the Fifth and Sixth Amendment rights, immunities and privileges of defendants in State criminal prosecutions.

2. Whether federal constitutional due process requires reversal of the judgment against petitioner because confessions used against him were obtained while defendant, and his co-confessor, co-defendant wife, were unlawfully detained by law enforcement officials.

3. Whether the confessions used against petitioner were involuntary, so as to vitiate the conviction as having been obtained in violation of and by denial of federal constitutional due process, without resort to the *McNabb-Mallory* exclusionary rule.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE.

Amendment XIV, Section 1., of the United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment V, of the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, of the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Chapter 38, Section 109-1, Illinois Revised Statutes 1965.

Person Arrested.

(a) A person arrested without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, and a charge shall be filed. A person arrested on a warrant shall be taken without unnecessary delay before the judge who issued the warrant or if he is absent or unable to act before the nearest or most accessible judge in the same county.

(b) The judge shall:

(1) Inform the defendant of the charge against him and shall provide him with a copy of the charge.

(2). Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code.

(3) Hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense; and

(4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code.

Rule 5 (a) of the Federal Rules of Criminal Procedure, Title 18 United States Code.

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Chapter 38, Section 19-1 Illinois Revised Statutes, 1965.

(a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in the Illinois Motor Vehicle Law, approved July 11, 1957, as amended, railroad car, or any part thereof, with intent to commit therein a felony or theft. This offense shall not include the offenses set out in Section 4-102 of the "Illinois Motor Vehicle Law", as heretofore or hereafter amended.

(b) Penalty.

A person convicted of burglary shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than one year. As amended by act approved August 13, 1965. L. 1965, p. ....., H.B. No. 707.

STATEMENT OF THE CASE.

Petitioner, Donald F. Underhill, was charged in an indictment returned to the Circuit Court of Kane County, Illinois by the February 1966 Kane County, Illinois Grand Jury, with the commission of the crime of burglary in violation of the Criminal Code of Illinois (R. 6, A. 14a).[1] Linda L. Underhill, wife of Donald, was charged in the same indictment with having aided or abetted her husband in the commission of the said burglary. Both petitioner and his wife pleaded not guilty (R. 90, A. 19a), and they were tried together before a jury that returned verdicts of guilty against both (R. 95, 98, A. 19a-20a). After the motion of the defendants for new trial was denied (R. 104, A. 21a), the Court sentenced petitioner, defendant Donald F. Underhill, to a term in the Illinois State Penitentiary of not less than two nor more than twelve years (R. 105, A. 21a).

Prior to the trial petitioner and his wife filed a written motion to suppress confessions allegedly made by them, in which they alleged that the confessions had not been voluntarily made (R. 14, A. 15a). Prior to the trial a hearing was had and testimony of witnesses was taken upon the motion to suppress the confessions (R. 119, A. 22a). At the hearing of the motion to suppress confessions the following facts were developed:

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[1] R refers to page of trial court record used in the Supreme Court of Illinois, and A refers to page of the Appendix hereto.

Petitioner and his wife, who were residents of Elgin, Illinois, were travelling in an automobile on an Elgin Street just before 7 o'clock on the evening of January 16, 1966 at which time their automobile was stopped by two Elgin Police Officers. (R. 126-127, 134, 157, 166-169, A. 23a, 25a, 32a, 36a-37a). Petitioner's wife was driving the automobile and they were going to a hospital to see their sick baby (R. 128, A. 23a). The Police Officers told petitioner and his wife to come to the Police Station and she drove her car to the Police Station and they followed her. The two arresting Officers were Patrolman Lloyd and possibly Patrolman Volmer (R. 157, A. 32a).

At the Police Station, petitioner was locked in a cell (R. 134, A. 25a), and his wife was locked in a cell (R. 128, A. 23a). On the next morning, January 17, 1966, at about 10:30 (according to petitioner—R. 134, A. 25a), or at about 9:00 or 9:30 (according to Police Officer Stegle —R. 140, A. 27a), Police Officer Stegle took petitioner from his cell to the Detective Bureau in the Elgin Police Department, and had a conversation with him with respect to a burglary of the Manor Coffee Shop in Elgin (R. 140, A. 27a).

At this point the evidence becomes conflicting in material aspects. According to petitioner's wife, Officer Stegle took her from her cell on the day after the arrest into a room where Lt. Theis and Officer Jensen were present and Stegle asked her what she knew about some checks. Three hours later, about 2:00 P.M., they took her to the same room, same parties present, and Stegle said that they knew about the burglary and wanted her to tell about it (R. 128, A. 23a). Stegle threatened to charge her with adultery if she didn't give him the answers; told

her that he would let her go if she told him, would see that she got probation if she was found guilty, and asked her in return therefor to testify against her husband (R. 130-132, A. 24a-25a). She made no admissions or confession (R. 122, A. 22a). According to Officer Stegle when he saw petitioner's wife on the day after the arrest, it was shortly before noon and only Officer Jensen was present (R. 145, A. 29a). He did not threaten her "of committing adultery", did not tell her he would let her go if she answered questions, did not promise probation if she'd testify against petitioner. He asked her about the burglary, and though she at first denied it, when he told her petitioner had already told him about it, she told him that petitioner had told her to get a key, and that she had taken a key from the counter and given it to petitioner (R. 145-147, A. 29a). She told him that petitioner had made a duplicate key and that she placed the original key back on the counter. No promises or threats were made to or toward petitioner's wife and she did not request an attorney. There was no discussion between petitioner's wife and him about probation (R. 147, A. 29a).

Officer Jensen corroborated Officer Stegle's testimony that Lt. Theis was not present when petitioner's wife was questioned, and that there was no discussion with her concerning probation, her moral character or what would happen to her if she didn't talk (R. 154-155, A. 23a). He admitted that petitioner asked that his wife be kept out of it and that Stegle had replied that they would not keep her out of it but that they would not fight probation for her.

Lt Theis admitted seeing petitioner's wife in the station on the day after the arrest, but denied having talked to

her. To his knowledge, no promise of leniency was made to petitioner's wife (R. 162, A. 34a).

According to petitioner, he had been told by Officer Smith, when he was brought into the police station, about 7:00 P.M. on the night of the arrest, that he was charged with "driving without a driver's license" (R. 134, A. 25a). He was locked up. The next morning at 10:30, Lt. Stegle took him to the Detective Bureau room to talk. Officer Stegle, Officer Theis, and Officer Jensen were present when he was shown about 25 checks, and, when Stegle pointed and told him that he had found in his possession a key to the place from where the safe was missing. When petitioner denied any knowledge of the safe, Stegle told him that they could not convict him of anything, but that they could convict his wife of forgery. Stegle held up about 25 checks and told petitioner that if he would tell them about the burglary they would "let her go on this forgery" (R. 137, A. 26a). Lt. Theis came in and promised that petitioner's wife wouldn't be charged if he would tell him that he committed the burglary.

He had asked to make a phone call on the night of the arrest, but Lt. Smith had refused permission (R. 134, 138, A. 25a, 26a). He had had two conversations with the Detectives on the morning after the arrest—the first at 10:30 ending when he had refused to tell them. The second conversation was at about 10:50 A.M.

Officer Stegle testified that he had told petitioner that he thought that his wife had been involved in the Manor Coffee Shop burglary because he felt she had gotten the key while working there (R. 141, A. 27a). Petitioner told him that he would tell about the burglary if Stegle would keep his wife out of it. Stegle said he answered that he

was making no promises. Then Stegle said that later in the day petitioner talked with Lt. Theis and asked about probation for his wife and that Theis told him "The Police Department wouldn't object to probation for her, but we will go along with whatever the State's Attorney's Office recommends" (R. 142, A. 27a). Stegle denied that there was any conversation about sending petitioner's wife to a reformatory, or that they couldn't convict him of anything but could convict her of forgery. He admitted that petitioner had asked to make a phone call, but said it was on the morning after the arrest, and that petitioner had telephoned an attorney, but did not reach him (R. 143, A. 28a).

Officer Jensen corroborated the testimony of Officer Stegle as to the conversations with petitioner on the day after the arrest (R. 148-152, A. 30a-31a). He added that petitioner had admitted a part in the burglary during the conversation. He also said that Officer Stegle had told petitioner, when petitioner had asked them to keep his wife out of it, "we would not fight the probation for her, but we would not leave her out of the case" (R. 153, A. 31a-32a). He then said he believed Lt. Theis made that statement to petitioner (R. 154, A. 32a).

Officer Theis testified that the only conversation he had had with petitioner was on the afternoon of the day after the arrest, and that the conversation was in the presence of Officers Jensen or Stegle. He said that petitioner had asked to inform against someone about traffic in dope or pornographic matter, and to be allowed to leave the state with his wife. He had told petitioner that he could not make such a deal but would not oppose probation for the wife (R. 162-163, A. 34a-35a).

On the facts of the reason for the arrest of petitioner the following testimony was received:

LINDA UNDERHILL—The police picked them up as she was driving her husband in the car. They told her to come to the police station with them. She drove her car to the police station, and they followed her (R. 128, A. 23a).

DONALD UNDERHILL—At the station he was told by Officer Smith that he was charged with "driving without a driver's license". He was not served with any papers on that charge (R. 134, A. 25a).

OFFICER STEGLE—Petitioner was in the lockup the morning after the arrest because of driving a car without a driver's license and "also, we wanted to talk to him about some checks" (R. 143, A. 28a). He was actually charged with the crime of no operator's license (R. 143-144, A. 28a).

OFFICER JENSEN—He believed that petitioner was arrested for driving with "a revoked driver's license". He believed Officer Stegle had given orders to arrest petitioner for "attempted forgery at the Union Bank", and that this was the reason he was to be "picked up" (R. 158, A. 33a). Both petitioner and his wife were in custody on the day after the arrest (arrest January 16, 1966) because they were "picked up and charged with investigation, deceptive practices", and both were charged with that (R. 159, 164-165, A. 33a, 35a). He had seen the charge on petitioner's property envelope. Petitioner was originally under investigation for the checks and then information was given the officers that petitioner's wife had worked at a place that was burglarized and left the day after it

was burglarized, and the "safe being found" (R. 166, A. 36a).

Officer Smith—When brought in, petitioner "had no operator's license, but he was booked for investigation of deceptive practice also" (R. 168, A. 37a). Petitioner's wife was not charged with "no city vehicle tag" as appears on the back of our folder. She had been driving the car, and they were going to charge her with that (R. 169-170, A. 37a-38a). The Officer who stopped the car had seen petitioner driving and had seen him switch seats with his wife before the car stopped (R. 170-171, A. 38a). No complaint had been filed or warrant issued for the arrest of petitioner or his wife for deceptive practice, but Lt. Theis had alerted the Officers to look for them (R. 171, A. 38a).

At the trial the following facts were developed:

On Sunday morning, December 12, 1965, the owner of Manor Coffee Shop in Elgin, Illinois discovered that a gold-tinted safe was missing therefrom. He found no evidence of forcible entry into the shop (R. 190-194). Keys to the Coffee Shop had been entrusted to the owners and various employees, except that no key had been entrusted to Underhill's wife who was one of the employees (R. 195-201).

On January 11, 1966 some Elgin police officers found four parts of a small safe on the shoulder of a roadway (R. 210). The safe was the same color as the missing safe (R. 202). The officers took the safe into the Elgin Police Department (R. 211), and on February 17, 1966 they took the safe to the Illinois Crime Laboratory at Joliet, Illinois for examination (R. 212).

On January 16, 1966 at about 7:00 p.m. Donald Underhill's wife was driving him in an auto down an Elgin Street on the way to a hospital to visit their baby when an Elgin police squad car pulled up behind them with a red light on. His wife pulled over, and police from the squad car "got" Donald out of the car and asked his name (R. 345, 374). One of the police officers asked petitioner's wife for her driver's license, which she gave him; and the officer told her to follow him to the police station, which she did (R. 375). At the police station the officers took Donald Underhill and his wife into a room in which they searched her husband and seized all of his personal property. They took his wife's purse and they locked her in a cell (R. 377). Underhill was also locked in a cell (R. 346). At 9:30 the next morning two officers took petitioner's wife from her cell to an interrogation room (R. 379). At about 9:30 the next morning two officers took Underhill from his cell and asked him questions (R. 347).

In the presence of Officers Jensen and Theis, at 9:30 A.M. on February 17, 1966,[1] he had asked petitioner about the safe burglary at the Manor Coffee Shop, and had asked him to look at the safe. Petitioner denied knowledge of the burglary and he said he had never seen the safe before (R. 217). The officer told petitioner that he felt that his wife had obtained a key to the place while working there, and petitioner said he would tell everything if Stegle would keep his wife out. Stegle refused to promise. Petitioner thereupon said that he had asked his wife to get a key to Manor Coffee Shop, which she did; and that he had a duplicate of the key made at Elgin Lock and

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[1] This is error. The officer obviously meant "January".

Key, and returned the original to his wife to return to the Coffee Shop (R. 217-218). Petitioner further told him that on December 12, 1965 at 3:00 A.M. he had driven an auto to the coffee shop, entered the rear door by use of the duplicate key, and had taken the safe to his home where he pried it open with a crowbar and two screwdrivers. He had removed $250 cash and other contents from the safe and dumped it on Spaulding Road. He had thrown the cash box into the river. He told Stegle that the duplicate key was among his personal property, and Stegle had brought his personal property envelope to him, from which petitioner had removed a key which he said was the duplicate key that he had used (R. 219-221). Petitioner agreed to give Stegle the crowbar and screwdrivers he had used. Stegle and Jensen drove petitioner to his home. Petitioner took them into his home, and down to his basement, where he showed them the floor where he had opened the safe. He handed them the crowbar (People's Exhibit 4) which he said he used (A. 222-225). Stegle and Jensen drove petitioner back to the police station and walked with him to a post office garage, where petitioner opened the trunk of his car which was stored there and removed two screwdrivers (People's Exhibits 5 and 6) which he said he had used to help open the safe. The crowbar and screwdrivers were taken to J. W. Nicol, Illinois Crime Laboratory, along with the safe on February 17, 1966, and returned to the Officers on May 6, 1966. On January 17, 1966, petitioner's wife told Stegle that petitioner had told her to get a key while she worked at the Coffee Shop. She had taken the key from the Counter and had given it to petitioner; and she had replaced it on the Counter after he had had a duplicate made (R. 226).

Officer Jensen substantially corroborated Officer Stegle's testimony about the contents of the confessions. He added that, when Stegle told petitioner that he suspected that petitioner's wife had had something to do with the burglary at the Manor Coffee Shop—she having possibly obtained the key—petitioner had offered to tell about the safe if they kept his wife out of it, and that they had said that they could not do that but that they would not oppose probation. Petitioner then confessed the burglary (R. 252-258, A. 39a-41a). Officer Jensen also testified the same as Stegle as to the confession of petitioner's wife (R. 259, A. 42a).

Both petitioner and his wife repudiated the confessions and denied the charge (R. 340 et seq, R. 369 et seq), and petitioner asserted an alibi defense (R. 340-344, 369-373). Their alibi was that on Saturday, December 11, 1965 petitioner's wife had worked from 7:00 a.m. to 2:00 p.m. at the Coffee Shop that was allegedly burglarized; that on the night of the alleged burglary, which had occurred sometime between 9:30 p.m. on December 11, 1965 (at which time employees had closed the shop (R. 324)), and 9:30 a.m. on December 12, 1965 (when the owner entered the store and discovered the safe missing), petitioner's wife had driven him in her father's vehicle to a wedding reception, where they had remained from 6:30 to 9:30 or 10:00 p.m.; from which reception they had driven to a friend's house, where they remained from 10:30 p.m. to 11:30 p.m.; from which house they had driven to his wife's father's home, where they arrived at about 12:30 a.m.; and that his step-father had thereupon driven them to their home, where they arrived at about 12:45 p.m. They had thereupon put their baby to bed, drunk some coffee and had gone to bed and remained there.

The verdict of the jury that Donald F. Underhill is guilty of burglary was returned and filed on May 11, 1966. On May 27, 1966, petitioner filed a written motion for new trial. (R. 64, A. 17a) In the said motion petitioner and his wife complained that the confessions used against them should have been excluded from evidence for the reason that the confessions were purportedly given when both were being held incommunicado and without charge in the City Jail of Elgin, Illinois, after both defendants had requested and been denied the right to contact legal counsel to represent them, while they were without counsel representing them during the in-custody interrogation that resulted in the alleged confessions, and where they had not been advised of their rights to advice of counsel and to remain silent, or any of their rights guaranteed by the Constitution of the United States or of the State of Illinois. On July 5, 1966 the Court held a hearing of the motion for new trial. (R. 531) The Court denied the motion. (R. 548-549)

On appeal to the Supreme Court of Illinois, the first three points argued in defendant's original brief are as follows:

1-A.

THE EXTRAJUDICIAL ORAL CONFESSION OF THE DEFENDANT WAS INVOLUNTARILY MADE AND WAS INCOMPETENT AND INADMISSIBLE AS EVIDENCE AGAINST HIM, AND THE TRIAL COURT'S RECEPTION OF SAID ALLEGED CONFESSION CONSTITUTED REVERSIBLE ERROR UNDER THE APPLICABLE STATUTES AND DECISIONS OF THE HIGH COURT OF ILLINOIS AND CONSTITUTED A USE OF EVIDENCE AGAINST DEFENDANT OBTAINED IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 10 OF THE ILLINOIS CONSTITUTION, AND ALSO DEPRIVES DEFENDANT OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

1-B.

BECAUSE IT BECAME APPARENT DURING THE TRIAL OF THIS CASE THAT THE CONFESSION OF DEFENDANT WAS ELICITED BY POLICE OFFICERS WHILE HE WAS HELD IN THEIR CUSTODY AND WHEN HE WAS THE SOLE SUSPECT AND WITHOUT ANY LEGAL COUNSEL TO REPRESENT HIM OR ADVISE HIM; AND THAT PRIOR TO AND DURING THE GIVING OF HIS CONFESSION HE WAS NOT ADVISED BY ANYONE OF HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION, AND OF HIS RIGHT TO COUNSEL, THE COURT ERRED BY FAILING TO GRANT DEFENDANT'S MOTION FOR NEW TRIAL WHERE THESE MATTERS WERE SET FORTH AS ONE OF THE GROUNDS THEREFOR.

1-C.

THE CONFESSION OF DEFENDANT'S WIFE, WHO WAS CO-DEFENDANT WITH HIM IN THE INDICTMENT, WAS NOT COMPETENT AS EVIDENCE AGAINST THE DEFENDANT FOR THE REASON THAT THE ALLEGED CONFESSION WAS MADE OUTSIDE THE PRESENCE OF THE DEFENDANT, THE FACTS ALLEGEDLY CONFESSED TO BY HER WERE NOT ONLY DENIED BY HER AT THE TIME OF TRIAL, BUT BY DEFENDANT AS WELL AND THE JURY WERE NOT INSTRUCTED THAT HER CONFESSION WAS COMPETENT AND ADMISSIBLE AS AGAINST HER ALONE, AND NOT AS AGAINST THE DEFENDANT. THE FAILURE TO INCLUDE IN HIS CHARGE TO THE JURY SUCH CAUTIONARY INSTRUCTION OF ITSELF CONSTITUTES REVERSIBLE ERROR EVEN IF BY SOME REASONING THE CONFESSION OF DEFENDANT'S WIFE CAN BE HELD TO HAVE OTHERWISE BEEN PROPERLY RECEIVED IN EVIDENCE AT THE TRIAL.

At pages 33 to 37 of his main brief in the Illinois Supreme Court, petitioner argued that the confessions were inadmissible because they were obtained while he and his wife were being unlawfully detained, and where the police officers had not taken them before a judicial officer without unnecessary delay as required by Illinois Law. Petitioner also argued on those pages that the *McNabb-Mallory* exclusionary rule should be enforced against the States through the Fourteenth Amendment to the United States Constitution.

ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT.

I.

THE McNABB-MALLORY EXCLUSIONARY RULE, WHICH THIS HONORABLE COURT APPLIES IN FEDERAL CRIMINAL PROCEEDINGS AS A SANCTION TO ENFORCE RULE 5(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, SHOULD BE APPLIED AGAINST THE STATES THROUGH THE FOURTEENTH AMENDMENT IN THE SAME MANNER AND FOR THE SAME REASONS THAT THE FEDERAL EXCLUSIONARY DOCTRINE IN FOURTH AMENDMENT CASES WAS MADE APPLICABLE AGAINST THE STATES BY THIS COURT IN MAPP v. OHIO. ALSO, ONLY BY FORCING THE STATES TO EXCLUDE CONFESSIONS OBTAINED DURING ILLEGAL DETENTION, CAN THE SAFEGUARDS OF FIFTH AND SIXTH AMENDMENT RIGHTS WHICH ARE ENFORCED AGAINST THE STATES THROUGH THE FOURTEENTH AMENDMENT IN MIRANDA v. ARIZONA, BE MADE FULLY EFFECTIVE IN STATE CRIMINAL PROCEEDINGS.

No question or dispute exists that the confession of petitioner, and the confession of his co-defendant wife, without which he could not have been accused of, much less than tried and convicted of the crime of burglary, were obtained, if at all, while they were being unlawfully detained in a police station by police officers in violation of an Illinois Statute that commanded that they be taken, without unnecessary delay, before the nearest and most accessible judicial officer in Kane County, Illinois. (see opinion of Illinois Supreme Court, A. 1a) The violated Illinois Statute (Chapter 38, Section 109-1, Illinois Revised Statutes 1965), is substantially the same as Rule 5(a) of the Federal Rules of Criminal Procedure (Title 18

United States Code), which Rule was involved in *McNabb* v. *United States,* 318 U.S. 332, 87 L. ed. 819, 63 S. Ct. 608, and in *Mallory* v. *United States,* 354 U.S. 449, 1 L. ed. 2d 1479, 77 S. Ct. 1356. Petitioner, in his main brief in the Supreme Court of Illinois, argued extensively that what has become known as the "*McNabb-Mallory* Rule" excluding confessions obtained during periods of unlawful detention, should be enforced against the states, thus to give effect to the fifth amendment privilege against self-incrimination by way of the due process clause of the Fourteenth Amendment. (Defendant's brief and argument, Illinois Supreme Court pp. 33-37.) The Illinois Supreme Court rejected this argument without any reference to the *McNabb-Mallory* Rule, or to the propriety or impropriety of its application in state prosecutions, and said merely the following:

> "The evidence at this hearing was contradictory. While the record does indicate that defendants were not promptly presented before a Magistrate as required by Section 109-1 of the Code of Criminal Procedure, such delay did not of itself vitiate the confessions but was merely a factor to be considered on the question of the voluntariness of the confessions. (*People* v. *Harper,* 36 Illinois 2d 398, 223 N.E. 2d 841)" (See opinion of Supreme Court of Illinois, A. 9a)

In *People* v. *Harper,* 36 Ill. 2d 398, 223 N.E. 2d 841 (1967), the Illinois Supreme Court had said, unequivocally, that it did not follow the *McNabb-Mallory* Rule that unnecessary delay in presentment before a Magistrate, *per se,* renders a confession inadmissible, and that the *McNabb-Mallory* Rule did not rest on constitutional principles, and that therefore it did not "of necessity apply to state criminal prosecution."

While true that the opinions of this Honorable Court in the *McNabb* and *Mallory* cases did not expressly rest the decisions that the confessions were inadmissible upon constitutional grounds, neither did this Honorable Court hold that federal constitutional provisions were inapplicable to the issue.

For many years after this Honorable Court had held that the Fourth Amendment barred the use of evidence secured through an illegal search and seizure in *federal* criminal prosecutions (*Weeks v. United States,* 232 U.S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R.A. 1915, B. 834, Ann. Cas. 1915 C. 1177 (1914)), the Court said nothing to cause the *Weeks* exclusionary rule to "of necessity apply to state prosecutions." Indeed the Court did, in *Wolf* v. *Colorado,* 338 U.S. 25, 93 L. ed. 1782, 69 S. Ct. 1359 (1949) refused to impose the *Weeks* exclusionary rule upon the states. Finally, the Court, in *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684 (1961), held that the *Weeks* exclusionary rule was enforceable against the states by way of the Fourteenth Amendment. The compelling reasons, quoted in the *Mallory* opinion from the *McNabb* opinion, for the exclusion of confessions taken from accused persons while they are unlawfully detained in violation of the provisions of Rule 5 (a) of the Federal Rules of Criminal Procedure, are as equally compelling to the safeguarding of Fourteenth Amendment due process rights of state criminal defendants. In fact, the purpose and calculated effect of the enforcement of the *McNabb-Mallory* exclusionary rule against the states is more clearly certain of accomplishment of the end of safeguarding the constitutional rights of state criminal defendants, than is the enforcement against the states of the *Weeks* exclusionary

rule relating to unlawfully obtained evidence. There has existed considerable doubt that the exclusion of evidence obtained in violation of the provisions of the Fourth Amendment is the best method to insure that Fourth Amendment rights will not be violated in state criminal proceedings.

> "There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine 'the criminal is to go free because the constable has blundered'. *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. ed. 2d 1081, 1092, 81 S. Ct. 1684, citing *People* v. *Defore,* 242 N.Y., at 21, 150 N.E. at 587.

This Honorable Court in *Mapp,* while recognizing that in some cases undoubtedly the criminal would go free because the constable blundered, considered judicial integrity, and the evil that might occur should the government become a lawbreaker and thus invite every man to become a law unto himself, to be a lesser evil and a lesser danger to ordered freedom as contemplated in the constitution. This Honorable Court, in *Mapp,* also rejected the argument that the adoption of the *Weeks* exclusionary rule would hamper the efforts of law enforcement bodies and render them ineffective. The Court, adopting language from its prior decision in *Elkins* v. *United States,* 364 U.S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437 (1960), noted that the use of the *Weeks* exclusionary rule in the federal courts for half a century, had not rendered the Federal Bureau of Investigation ineffective, nor had it disrupted the administration of criminal justice in the federal jurisdiction. The Court also said that "The movement toward the rule of exclusion has been halting but seemingly inexorable." (367 U.S. 660, 6 L. ed. 2d 1093.) The enforcement of the *McNabb-Mallory* Rule would render many methods used

by many state law enforcement officials to obtain quick and involuntary confessions, futile, and, because of the very uselessness of such methods, would drastically reduce their employment, if not eradicate them.

In the case before the Court, the Illinois Supreme Court held that the fact that petitioner and his wife were interrogated without the benefits of the procedural safeguards of their constitutional rights set forth in *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, did not render their confessions inadmissible since defendant was tried before the date of the prospective application of the *Miranda* standards. The Court cited *Johnson* v. *New Jersey,* 384 U.S. 719, 16 L. ed. 2d 882, in support of that conclusion. However, is it not an anomaly that the *Miranda* standards, designed to safeguard the Fifth and Sixth Amendment constitutional rights of persons suspected of crime from denial by law enforcement officials, are enforced against the States by and through the due process clause of the Fourteenth Amendment, while the more important and effective safeguard of both of these Constitutional rights, which is accomplished by the *McNabb-Mallory* rule, is not enforced against the States in the same manner? Much of the safeguarding purpose of *Miranda* can be evaded by State law enforcement officials by the use of psychological coercion through the simple device of holding the accused in jail until he decides to waive his constitutional rights and privileges, and to confess so that he may be taken before a judicial officer and be promptly heard and tried, or be freed from restraint until he is tried and convicted. Should this Honorable Court withhold the enforcement of the *McNabb-Mallory* rule against the States, it will have diluted the good inten-

tions of *Miranda,* and will have rendered the *Miranda* standards far less effective in the safeguarding and preservation of the Fifth and Sixth Amendment constitutional rights of all persons in the 50 States. Had the police officers, in the case now being sought to be brought before the Court by this Petition, given petitioner advice of every right he possessed under the Fifth and Sixth Amendments, which they did not do, and had petitioner fully understood his rights, the prospect that he and his wife may have remained in jail for an undetermined period of time, away from their hospitalized baby, could be calculated to induce him to confess a crime which the officers had no evidence that he had committed, merely to secure his and his wife's, or merely his wife's release from jail. He and his wife had been thrown into a jail cell on Sunday night about 7:30 p.m., and on that Monday morning, January 17th, when they should have been taken before a Magistrate, who would have been duty-bound under the Illinois Statute to apprise them of their Constitutional rights and to consider and fix bail, they were taken into an interrogation room at the police station. At no time was an offer made to take them before a judicial officer, and at no time was there any indication by the police officers of when they intended to do so. According to the undisputed, uncontradicted testimony of defendant's wife, they were not taken before a judge until Wednesday, January 19, 3 days after their arrest. (R. 396)

II.

WHETHER OR NOT THE McNABB-MALLORY EXCLUSIONARY RULE, OR ITS SANCTION, IS MADE APPLICABLE TO THE PROCEEDINGS IN THIS CASE, THE CONFESSION OF DEFENDANT WAS INVOLUNTARY, AND THE USE OF HIS CONFESSION AND THE CONFESSION OF HIS WIFE AGAINST HIM CONSTITUTED A DENIAL OF DUE PROCESS.

In the pretrial Motion to Suppress Confession (R. 14) it is alleged that petitioner was induced to make his confession by a promise made by one of the officers interrogating him, that in exchange for a confession, the police would not fight probation for petitioner's wife. Petitioner's wife, according to the motion, was induced to confess by promises of leniency and was coerced to confess by threats made by the interrogating officers, and by a promise that they would go easy on her and get her probation if she confessed. Also the motion alleged that petitioner's wife was told by the interrogating officers that they only wanted to put her husband behind bars and that they would see to it that she got probation if she talked. (R. 16, A. 15a-16a)

At the pretrial hearing of the Motion to Suppress the Confession it was not disputed and his wife was arrested and taken into the Elgin Police Station at about 7 o'clock on the evening of January 16, 1966, nor was it disputed that they were both locked in cells in the Police Station and kept there that entire evening without any formal charge and without bail; nor was it disputed that they did not communicate with anyone whomsoever until the morning of the next day, January 17, 1966; nor was it disputed that on that next day, January 17, 1966, neither petitioner nor his wife communicated with any person other than Elgin Police Officers. It was not disputed that

on that next day, January 17, 1966, the date of the alleged confessions of petitioner and his wife, that neither of them had been taken before a magistrate or other judicial officer, and that each was at various times during that day, taken into an interrogation room in the Elgin Police Station and subjected to questioning by police officers. Although a dispute exists between petitioner and his wife on one hand, and the interrogating Officers on the other, as to the details of the conversation between them during the interrogation, there is no dispute that Officers of the Elgin Police Department promised petitioner that if he would confess, the Elgin Police Department would not object to probation for petitioner's wife. (R. 142, 153, 161) No dispute exists that January 16th, the date of petitioner's arrest was Sunday, and that January 17, 1966, was Monday. Although there is some dispute among the Police Officers themselves as to the reason why the petitioner and his wife were arrested; there is no dispute at all in the record that they were not arrested for the burglary for which they were subsequently charged and convicted in this case. The charge of burglary came only after the interrogation and confession while petitioner and his wife were in custody on January 17, 1966.

Therefore, two important conclusions of fact bearing upon the question of the competency and admissibility of petitioner's confession are without dispute or contradiction—that is, (1) that petitioner and his wife were held incommunicado by the Elgin Police Officers for one entire night and one entire week-day, and more, without being taken before a Magistrate or other Judicial Officer, and (2) that petitioner's confession, if any such was made as testified by the Police Officers, came only after he and

his wife had been held in jail more than 14 hours, had been denied a prompt hearing by a Judicial Officer in violation of Illinois law, and had been taken from their cells and questioned at least twice during their unlawful detention; and only after petitioner had been promised by the interrogating officers, however cautiously, that, if he would confess, his wife would most probably receive probation, and where he had been threatened that, if he did not confess, she would very likely be imprisoned.

The Illinois Supreme Court agreed that the factors described above, bearing upon the question of the involuntary nature of the confessions admitted against petitioner, are present in the record. The Court, after stating that the police officer denied making any threats or promises of leniency as claimed by petitioner, observes that the police officers had testified with regard to their discussion with petitioner concerning probation for his wife, that they had "merely informed him that they would not oppose such probation while pointing out that it was not their prerogative to grant probation." (A. 9a) And the Court unequivocally states that the record indicated that the petitioners were not promptly presented before a Magistrate as required by Sec. 109-1 of the Illinois Code of Criminal Procedure. (A. 9a) The Court then expressly states that it would not disturb the Trial Court's finding of voluntariness of the confession on review because there was substantial evidence in the record to support the trial court's findings of voluntariness. The Court, however, did not delineate this substantial evidence in the record that supported the trial court's finding of voluntariness.

It has long been the rule in Illinois that a confession is involuntary and inadmissible if obtained by force and

brutality or by promises of leniency. *People* v. *Sammons,* 161 N.E. 2d 322, 324; 17 Ill. 2d 316 (1959). In 1929, the Illinois Supreme Court held that a trial court erred by admitting a defendant's confession where the same was obtained from her under a promise that it would inure to her benefit in her trial for the offense for which she was arrested, and was to be tried. *People* v. *Stokes,* 334 Ill. 200, 209 (1929). It is also the law in Illinois that, although the Illinois Supreme Court has rejected the *McNabb-Mallory* exclusionary rule, and its rationale, and has persistently rejected all argument that the admission of confessions obtained during periods of unlawful detention *per se* violates due process guaranteed by the Fourteenth Amendment to the United States Constitution, any delay in the bringing of a defendant before a Magistrate should be considered upon the question of whether or not any confession made by him during the course of the unlawful detention is voluntary. *People* v. *Hall,* 110 N.E. 2d 249, 413 Ill. 615 (1953); *People* v. *Taylor,* 211 N.E. 2d 673, 33 Ill. 2d 417 (1965); and the opinion in the present case. (A. 1a) The Illinois Supreme Court in the present case apparently construes coercion to confess to mean only the use of threats or physical brutality, or the promise of immunity or leniency that is within the power of the promisor to effect. In Petitioner's main brief before the Illinois Supreme Court, he argued that the coercion that rendered his confession involuntary was psychological. He and his wife had a small hospitalized baby. He and his wife, particularly his wife and another woman, were suspected by the police officers of forgery, and the police officers did in fact testify that they had orders to arrest petitioner and his wife for questioning about an alleged

forgery. His wife was detained in a jail cell as well as he. Neither he nor his wife were taken before a judge or other judicial officer on the next morning, but were taken into an interrogation room in the police station. He desired to protect his wife and to secure her release from jail and offered to tell about the burglary and give other information to the police if they would help her. The officers promised that they would not oppose probation for his wife. He had been convicted before, and had served time in penal institutions; and he felt that he had little chance of being found not guilty of the accusations for which he was detained, for this reason. (R. 368)

As stressed by this Honorable Court, in *Miranda* v. *Arizona,* 384 U.S. 436, 448, 16 L. ed. 2d 694, 708, 86 S. Ct. 1602, "the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, 'Since *Chambers* v. *Florida,* 309 U.S. 227, 84 L. ed. 716, 60 S. Ct. 472, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn* v. *Alabama,* 361 U.S. 199, 206, 4 L. ed. 2d 242, 247, 80 S. Ct. 274, (1960)." The petitioner refers this Honorable Court to the consideration of psychological coercion to confess as one of its own major reasons for the holding in *Miranda* that certain confessions, that had been obtained during in-custody interrogation in the absence of physical brutality, were nevertheless involuntary and constitutionally impermissible. (384 U.S. at page 448, et seq. 16 Law Ed. 2d at p. 709 et seq.) Almost six years prior to *Miranda* this Honorable Court held that, under the due process clause of the Fourteenth Amendment, "convictions following the admis-

sion into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand." *Rogers* v. *Richmond,* 365 U.S. 534, 540, 5 L. ed. 2d 760, 766, 81 S. Ct. 735. The Court in *Rogers* held that the inadmissibility of such confessions was not because they were unlikely to be true, but because the method used to extract them offended an underlying principle in the enforcement of criminal law, ours being an accusatorial and not an inquisitorial system. In *Rogers,* as in the present case, defendant was induced to confess during an unlawful detention in an office of a law enforcement official, and upon a belief that his wife's freedom was in jeopardy if he did not confess. In *Rogers* the defendant had been transported from a County jail, where he had been held pending trial, to the office of a State's Attorney, without any court order authorizing the transfer. During his interrogation there, a police chief had indicated that he was about to have the defendant's wife taken into custody. At that point, the defendant announced his willingness to confess, and he did confess. This Honorable Court reversed the conviction based upon the confession in *Rogers* because the lower Court had judged the voluntariness of the confession by an improper standard.

It is respectfully contended that the Illinois Supreme Court abandoned its duty and power to determine for itself whether or not the confessions used against Petitioner was coerced. The Court said:

> "The trial court determined these questions by a preliminary hearing and found the confessions were voluntary. On review such determination will not be disturbed unless manifestly against the weight of the evidence, or unless the court has committed an abuse

of discretion. (*People* v. *Ackerson*, 37 Ill. 2d 117, 224 N.E. 2d 849; *People* v. *Spencer*, 27 Ill. 2d 320, 189 N.E. 2d 270.)" (A. 8a)

The true question before the Court was not the balancing of credibility of State's witnesses against that of petitioner and his wife, with the unsupported conclusion that the trial court had correctly weighed the respective credibilities; it was, rather, upon taking all of the facts and circumstances about which there was no dispute or contradiction into consideration, was the trial court's conclusion correct that the confessions were voluntary. The Illinois high court was in no way bound by the trial court's conclusion of this question, and, of course, this Court is not so bound in considering and rendering a constitutional judgment.

In *Lynumn* v. *Illinois*, 372 U.S. 528, 83 S. Ct. 917 (1963), where a police officer expressly threatened the Defendant with loss of financial aid for infant children and loss of the children if she did not cooperate, this Honorable Court held the confession to have been coerced, and that the judgment against the Defendant was vitiated by use of the coerced confession because it violated the due process clause of the Fourteenth Amendment.

In the present case the threat to Petitioner's family, even if it had not been made in words uttered by the police officers, was actual, imminent and direct. Petitioner had no reason to confess the burglary other than to secure the release of his wife and to protect his child. His will was overborne at the time he confessed the commission of this burglary by all of the surrounding circumstances and the unlawful detention, and, in addition thereto, by

the promise of the police officers that they would not oppose probation for his wife. In *Harris* v. *South Carolina,* 338 U.S. 68, 93 L. Ed. 1815 (1949), in addition to protracted in-custody questioning, and the failure to provide counsel or to advise the arrestee of his constitutional rights, the Sheriff threatened to arrest petitioner's mother for handling stolen property, and petitioner replied: "Don't get my mother mixed up in it and I will tell you the truth." The trial court instructed the jury, in that case, that without the confession there was no evidence which would support a conviction, and that they should consider the confession only if they found it to be voluntary. The jury found the Defendant guilty. The South Carolina high court found the confession to be voluntary. This Honorable Court disagreed and reversed the judgment.

Since neither the Illinois Supreme Court nor the Trial Court set forth the standards by which they arrived at the conclusion that the confessions of petitioner and his wife were voluntary, this Honorable Court is asked to apply its own standards, and to reverse the conviction based upon these confessions.

References are made herein to confession of petitioner's wife as well as to that of petitioner, for the reason that her confession was received against the petitioner at the trial. Petitioner's trial counsel made no motion for a trial of petitioner separate from his wife, nor did he tender a cautionary instruction to the Court that her confession could be used only against her and not against petitioner, and the Court did not give such an instruction. On appeal, the Illinois Supreme Court held that it would not reverse the judgment of the trial court because of the improper use of the confession of petitioner's wife against

petitioner, because petitioner had not tendered an instruction to be given to the jury that her confession could not be used against him.

Respectfully submitted on behalf of Petitioner,

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